

To: Docket Clerk

From: Caryn Holmes *ejh*  
Staff Counsel IV

Subject: Commission Order Denying Appeals of San Diego Gas and Electric Company Southern California Edison Company, and Pacific Gas and Electric Company of the Executive Director's Notice of Intent to Release Aggregated Data

Date: September 16, 2005

Attached please find the Commission Order Denying Appeals of San Diego Gas and Electric Company Southern California Edison Company, and Pacific Gas and Electric Company of the Executive Director's Notice of Intent to Release Aggregated Data. Although the Order is dated September 7, 2005 -- the day of the Business Meeting at which the Energy Commission heard and decided the appeal -- because the Order was not docketed until today, the Energy Commission will protect the disputed information from release for fourteen days from today.

# STATE OF CALIFORNIA

## Energy Resources Conservation and Development Commission

In the Matter of:	)	<b>Docket: 04-IEP-1D</b>
	)	
Preparation of the 2005	)	
Integrated Energy Policy Report	)	<b>Date: September 7, 2005</b>
_____	)	

### **Commission Order Denying Appeals of San Diego Gas and Electric Company, Southern California Edison Company, and Pacific Gas and Electric Company of the Executive Director's Notice of Intent to Release Aggregated Data**

In this decision, we address the claims made by the State's three investor-owned utilities (IOUs) that aggregations of confidential data they submitted during the Energy Commission's biennial integrated energy policy proceeding are themselves confidential and should be protected from release. We find that the aggregations -- prepared for the purpose of providing public information about long-term energy trends and facilitating public involvement in this energy policy proceeding -- will not cause the IOUs to lose an economic advantage (or allow others to gain an economic advantage vis-à-vis the IOUs). Therefore, the aggregations are not "trade secrets." We also find that the public interest served by not disclosing the aggregations does not clearly outweigh the public interest served by allowing the public to view them. For both these reasons, the aggregations are not entitled to confidential designation.

### **SUMMARY**

The California Energy Commission (Commission) is charged with preparing an Integrated Energy Policy Report (IEPR) every two years. (Pub. Resources Code, § 25302.) To carry out this responsibility, the Energy Commission conducts analyses and develops policies that serve as the basis for the Governor's official statement of energy policy. (Pub. Resources Code, § 25307.) In connection with these efforts, the Commission has extensive data collection responsibilities, as well as a specific mandate to protect confidential data. (Pub. Resources Code, §§ 25320 – 25322.) In addition, as part of the IEPR process, the Commission is directed to facilitate efficient and reliable energy markets. (Pub. Resources Code, § 25301, subds. (b)(4) & (b)(5).)

On January 19, 2005 and March 2, 2005, the Commission adopted Forms and Instructions identifying electricity resources and bulk transmission data (resource plan data) that certain load-serving entities must provide in order for the Commission to prepare the 2005 Integrated Energy Policy Report (2005 IEPR). Some of the data was due on March 1; the remainder was due on April 1, 2005. Each of the State's three IOUs – San Diego Gas and Electric Company (SDG&E), Southern California Edison Company (SCE), and Pacific Gas and Electric Company (PG&E) – filed the requested data, as did thirteen publicly-owned utilities, and five energy service providers (ESPs).<sup>1</sup> Each of the IOUs requested confidentiality for virtually their entire

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<sup>1</sup> ESPs are private business entities that sell electricity in California subject to the provisions of Public Utilities Code, section 394 et seq.

filings, although the three IOUs requested different periods of confidentiality.<sup>2</sup> One publicly-owned utility and four ESPs also filed for confidentiality. Pursuant to the Commission's regulations (Cal. Code Regs., tit. 20, § 2505), the applications for confidentiality were reviewed by the Executive Director, who granted the majority of them, although the period of confidentiality granted to the IOUs was generally shorter than requested. Neither the IOUs nor any other load-serving entity (LSE) appealed the Executive Director determinations.

On June 3, 2005, the Executive Director issued a Notice of Intent to Release Aggregated Data (NOI). The proposal was designed to protect the confidentiality of the resource plan data consistent with the Executive Director's earlier decision to grant the LSEs' applications for confidentiality, while providing aggregated information so that those entities not entitled to review the more detailed confidential data could nonetheless participate meaningfully in the development of the 2005 IEPR report. The NOI identified several different aggregations of confidential supply data, and stated that appeals of the aggregation proposal could be filed no later than June 17, 2005. The three IOUs filed separate appeals, but none of the other LSEs who had sought confidentiality for resource plan data did so. Because California courts "have traditionally treated the issue of whether information constitutes a trade secret as a question of fact" (*In re Provident Credit Card Cases* (2002) 96 Cal.App.4<sup>th</sup> 292 [116 Cal.Rptr.2d 833]), the Commission decided to conduct a hearing on the effect of releasing the aggregations. Pursuant to Commission Order, Commission staff and the three IOUs filed testimony on July 8; the same entities and the Independent Energy Producers (IEP) filed rebuttal testimony on August 12. The Commission held an eight hour evidentiary hearing on August 24. Based on the NOI, the three IOU appeals, and the testimony provided, the Commission hereby denies the IOU appeals.

## LEGAL FRAMEWORK

Public Resources Code sections 25301 and 25302 direct the Commission to assess all aspects of energy supply, production, transportation, delivery and distribution, demand, and prices, and to develop policies that conserve resources, protect the environment, ensure reliability, enhance the economy, and protect public health and safety. In order to carry out the assessments identified in Public Resources Code sections 25301 and 25302, Public Resources Code section 25301 authorizes the Commission to "require submission of demand forecasts, resource plans, market assessments, and related outlooks from electric . . . utilities . . .". Title 20, California Code of Regulations, section 1347, specifies that each electric utility shall provide a "20-year resource plan for meeting forecasted demand according to forms and instructions adopt by the Commission." (Cal. Code Regs., tit. 20, § 1347.)

The Public Records Act (Gov. Code, § 6250 et seq.) states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.) The Act establishes a general principle that every person has the right to inspect any "public record," subject to various exceptions. (Gov. Code, § 6253.) Public records are broadly defined, and include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252.) In addition, the state Constitution now directs that statutes and regulations shall be broadly construed if they

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<sup>2</sup> A complete identification of the specific information for which confidentiality was requested, the term associated with the requests, and the Executive Director's response to each request is found below.

further the people's right of access, and narrowly construed if they limit the right of access. (Cal. Const., art. I, § 3, subd. (b)(2).)

One of the exceptions to the Public Records Act's general rule of disclosure is for "trade secrets." Government Code section 6254 subd. (k) allows agencies to withhold "records the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." One such "federal or state law" is the Uniform Trade Secrets Act (Civ. Code, § 3526 et seq.), a California law that prohibits the release of trade secret information and provides for injunctive relief and damages as remedies. Another is California Evidence Code section 1060, which states that "the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." A "trade secret" is:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Civ. Code, § 3426.1, subd. (d).) In addition, agencies may withhold records not exempt from disclosure under a specific Public Records Act exemption when the agency finds, on the facts of the particular case, that the public interest served by not disclosing the record "clearly outweighs" the public interest served by disclosure of the record. (Gov. Code, § 6255, subd. (a).)<sup>3</sup>

Title 20, California Code of Regulations, section 2505 allows private parties submitting information to the Commission to file an application for confidential designation of that information. Section 2505 also requires the Executive Director, in consultation with the Chief Counsel, to issue a decision on the application within 30 days. Once information is deemed confidential, the Commission is prohibited from releasing that data, except in very narrow circumstances. However, the Energy Commission's confidentiality regulations allow the Executive Director to release data that has been granted confidentiality protection when that information has been aggregated or masked to the point necessary to protect confidentiality. (Cal. Code Regs., tit. 20, § 2507, subd. (d).)

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<sup>3</sup> Both the "trade secrets" exemption and the "balancing test" are also reflected in Public Resources Code, section 25322, which is part of the Warren-Alquist Act, which created the Commission. (Pub. Resources Code, § 25000 et seq.)

## PROCEDURAL HISTORY

### Forms and Instructions

On January 19, 2005 and March 2, 2005, the Commission adopted Forms and Instructions identifying resource plan data that certain LSEs must provide, in order for the Commission to meet its statutory mandate to prepare the 2005 IEPR. (Pub. Resources Code, § 25302.) The first filings, due March 1, 2005, contained resource plan data based on “base case” assumptions. The second filings, due April 1, 2005, asked for resource plan data under three different sets of assumptions, referred to as “scenarios.” The IOUs submitted both sets of information.

### Confidentiality Determinations

The three IOUs’ responses to the resource plan data Forms and Instructions included requests for confidentiality for virtually all of both the March 1 and April 1 filings. The Executive Director responded to these requests, for the most part granting the applications, although the three-year period of confidentiality he granted for the data that is associated with these appeals is less than that requested by the IOUs. Under the Executive Director’s determinations, the submitted data will be released in three years. No party appealed these determinations.

### Notice of Intent

On June 3, 2005, the Executive Director issued the NOI, which identified ten different proposals to aggregate confidential resource plan data. The aggregated information would be based on data contained in Forms S-1 and S-2, which identify the amount of energy and capacity the LSE needs to meet its obligations on a monthly basis, as well as the amount of energy and capacity that will be available from various resources.<sup>4</sup> The other resource plan data identified in the Forms and Instructions (Forms S-3 – S-5) is not affected by the NOI.<sup>5</sup> According to the NOI, the proposals were designed to protect the confidentiality of the data found in Forms S-1 and S-2, while providing aggregations of the underlying data so that Commissioners and the public could consider some level of resource plan information in the development of the 2005 IEPR.<sup>6</sup> Because of the Executive Director’s decision to grant a three-year term of confidentiality for the IOUs’ Forms S-1 and S-2, without aggregations, there would be very little publicly-available

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<sup>4</sup> Energy refers to the total amount of electricity produced or consumed over a given period of time; in these appeals, the time periods are quarters and years. Capacity refers to the rated capacity of generation resources to generate power under specified conditions. Capacity information is needed to know how an LSE will meet peak demand, which is the highest hour of electrical demand that an LSE experiences within a specified period of time; in these appeals, the time periods are quarters and years. Energy is denominated in megawatt-hours, and capacity is denominated in megawatts.

<sup>5</sup> Forms S-3 – S-5 address Generic Renewable Energy and Capacity Locations, Qualifying Facility Energy and Cost Projections, and Bilateral Contract information.

<sup>6</sup> Of particular concern is the information and analyses used by the Energy Commission in the 2005 IEPR to address issues concerning California Public Utilities Commission (CPUC) responsibilities. (Pub. Resources Code, § 25302 (f).) During the 2005 IEPR proceeding, CPUC President Peevey has issued two Assigned Commissioner’s Rulings (ACRs), in which he identifies informational and process requirements that should be met in conducting the 2005 IEPR so that its results can be integrated into the CPUC’s procurement proceeding. The aggregated information would allow for public participation in the development of IOU-specific need and resource assessments for use in the 2006 procurement proceeding, as called for in the ACRs. (President Peevey’s Assigned Commissioner Ruling, R.04-04-003, September 16, 2004.)

information on the IOUs' current 10-year resource plans until 2009, long after the current planning and procurement cycles are completed.

In order to understand the NOI, it is first necessary to summarize Forms S-1 and S-2, submitted by all LSEs as part of the required resource plan filings. In completing Table S-1, the IOUs first identified monthly peak demand for current bundled customers, and then subtracted those customer electricity needs that will be met by sources other than the IOUs' retail sales. (Examples of these other sources include certain energy efficiency programs, on-site generation, and, for direct access customers and future municipal utility customers, other retail providers.) Finally, a safety margin (called "reserve margin") of 15% was added, and any contractual obligations to sell electricity to other entities was subtracted. The resulting number is the IOU's bundled customer capacity needs. Form S-2 displays the same categories of information with respect to the IOUs' energy needs. As noted above, the IOUs filed S-1 and S-2 forms representing a "base case" on March 1, 2005 and forms representing three scenarios in April, 2005.

In the NOI, the Executive Director proposed to aggregate monthly data to quarterly and annual values. In addition, the various individual resources that the IOU proposes to use to meet energy and capacity needs would be aggregated into resource categories, thereby concealing the identity of individual resources. (Attachment A to this Order contains the NOI proposal for aggregated capacity and energy information.) The NOI identified the following ten different aggregated summary tables, based on the distinctions just identified, as well as the scope of the underlying data:

1. Bundled Customer Annual Capacity: These tables would contain aggregations of monthly peak capacity demand and supply data. There would be two forms of aggregation: monthly data would be aggregated to an annual level, and resource-specific data would be combined into various categories of resources. Because peak capacity is the maximum amount of capacity that the IOU will need to provide during the hour of highest load, this aggregation identifies the highest hourly load during the year, without identifying in which month or day it is expected to occur. The data that would be aggregated would be that for the IOU's bundled service customers; that is, those customers to whom the IOU provides retail electricity services.
2. Bundled Customer Quarterly Capacity: These tables would be identical to those showing bundled customer annual capacity, except that the monthly data would be aggregated to a quarterly level rather than an annual level. For peak capacity, the value identified will be the highest hourly load during the quarter, without identifying the month or day in which that occurred.
3. Bundled Customer Annual Energy: These tables would contain the same aggregation of resource categories as is used in bundled customer annual capacity. To aggregate energy demand, the energy requirements for each month in the year would be summed.
4. Bundled Customer Quarterly Energy: These tables would contain the same aggregation of resource categories as is used in bundled customer annual capacity. To aggregate energy demand, the energy requirements for each month in each quarter would be summed.

5. Planning Area Annual Capacity: These tables would be similar to bundled customer annual capacity, except that the data that would be aggregated would include that for the IOU's bundled service customers plus those customers within the IOU service territory for which the IOU provides either transmission or distribution services, but not electricity (this includes direct access customers and customers of municipal utilities).
6. Planning Area Quarterly Capacity: These tables would be similar to bundled customer quarterly capacity, except that the data that would be aggregated would include that for the IOU's bundled service customers plus those customers within the IOU service territory for which the IOU provides either transmission or distribution services, but not electricity (this includes direct access customers and customers of municipal utilities).
7. Planning Area Annual Energy: These tables would be similar to bundled customer annual energy, except that the data that would be aggregated would include that for the IOU's bundled service customers plus those customers within the IOU service territory for which the IOU provides either transmission or distribution services, but not electricity (this includes direct access customers and customers of municipal utilities).
8. Planning Area Quarterly Energy: These tables would be similar to bundled customer quarterly energy, except that the data that would be aggregated would include that for the IOU's bundled service customers plus those customers within the IOU service territory for which the IOU provides either transmission or distribution services, but not electricity (this includes direct access customers and customers of municipal utilities).
9. Planning Area Annual Capacity with Ranges: Under this proposal, the base case and three scenario S-1 tables provided separately in the aggregation identified as "Planning Area Annual Capacity" would be collapsed into a single table. Because the values in the individual cells might be different for the different scenarios, the aggregation would show the highest and lowest value from all the scenarios in each cell, e.g., a range.
10. Planning Area Quarterly Capacity with Ranges: Under this proposal, the base case and three scenario S-1 tables provided separately in the aggregation identified as "Planning Area Quarterly Capacity" would be collapsed into a single table. Because the values in the individual cells might be different for the different scenarios, the aggregation would show the highest and lowest value from all the scenarios in each cell, e.g., a range.

The proposed aggregation tables would consist of eight annual forms per year per IOU (a base case and three scenarios for both energy and capacity for each year), and 32 quarterly forms per year per IOU (a base case and three scenarios for capacity and energy for each quarter of the year). The NOI stated that the parties whose data was aggregated to produce the summary tables could file an appeal of the NOI with the full Commission within 14 days.

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### Appeals of NOI

Each IOU filed an appeal of the NOI. All three IOUs appealed the first two aggregated summary tables, PG&E and SCE appealed the fourth, SDG&E and PG&E appealed the sixth, and PG&E appealed the eighth and tenth. In sum, then, the tables from which appeals were filed are as follows:

Bundled Customer Annual Capacity: SDG&E, SCE, PG&E

Bundled Customer Quarterly Capacity: SDG&E, SCE, PG&E

Bundled Customer Annual Energy: no appeal

Bundled Customer Quarterly Energy: SCE, PG&E

Planning Area Annual Capacity: no appeal

Planning Area Quarterly Capacity: SDG&E, PG&E

Planning Area Annual Energy: no appeal

Planning Area Quarterly Energy: PG&E

Planning Area Annual Capacity with Ranges: no appeal

Planning Area Quarterly Capacity with Ranges: PG&E<sup>7</sup>

### Testimony and Hearing

Because California courts “have traditionally treated the issue of whether information constitutes a trade secret as a question of fact” (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4<sup>th</sup> 292 [116 Cal.Rptr.2d 833]), the Commission decided to conduct a hearing to evaluate evidence offered by parties about the effect of releasing the aggregations. The Commission issued a notice on June 23, 2005, stating that a hearing would be held on July 13, 2005 and that any interested person could present testimony and conduct cross-examination, subject to reasonable time limitations, at the hearing. Prefiling of testimony with the 2005 IEPR docket and persons identified on a service list was required by July 8, 2005. The three IOUs and Commission staff timely filed testimony. Subsequently, the IOUs and Commission staff recommended that the Commission postpone the hearing until August 24, 2005, and allow parties to file rebuttal testimony. Consequently, the Commission issued another notice on July 22, 2005, directing the filing of rebuttal testimony with the 2005 IEPR docket and persons identified on a service list by August 12, and stating that a Commission hearing on the appeals would be held on August 24, 2005. The three IOUs, staff, and the Independent Energy Producers Association (IEP) filed rebuttal testimony. An evidentiary hearing lasting approximately eight hours was held on August 24, 2005, at which the IOUs, staff, and IEP presented testimony and cross-examined each other’s witnesses.

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<sup>7</sup> Staff has dropped this portion of its proposal and it will not be addressed further in this Order.



### Summary of the Parties' Positions

The following is a summary of each IOU's request, the Executive Directors' determination regarding that request, and testimony supporting the NOI appeal, along with a summary of the NOI and staff and IEP testimony on the appeals.

#### SDG&E

SDG&E submitted supply information on March 1, and April 1, 2005. Both filings were accompanied by a request for confidential designation of Forms S-1 – S-5.<sup>8</sup> For Form S-1, SDG&E stated that the information on the form shows detailed information identifying SDG&E's monthly dependable capacity needs. For Form S-2, SDG&E stated that the information on the form shows detailed information about SDG&E's monthly energy needs. SDG&E stated that the two tables together "provide the complete picture of SDG&E's procurement needs, dispatch practices and strategies. . .". (SDG&E Application for Confidential Designation of Electricity Resource Planning Forms, April 1, 2005.) SDG&E requested confidentiality for the entire forecast period of ten years. SDG&E stated that release of the information could allow potential suppliers to use that information and cause higher power prices than would otherwise occur. For both the base case resource plan information and the scenario resource plan information, the Executive Director granted confidentiality for a three-year period.

In response to the Executive Director's NOI, SDG&E filed an appeal on June 17, 2005 of aggregations of bundled customer annual capacity data, bundled customer quarterly capacity data, and planning area quarterly capacity data. In its appeal, SDG&E stated that the confidential data in Forms S-1 and S-2 could be transmitted to the CPUC without disclosing it to market participants. SDG&E also noted that the aggregation proposal would result in different levels of disclosure for IOUs and ESPs. Addressing the issue of the effect of the release of the aggregations, SDG&E stated that the NOI would result in the disclosure of its "most market sensitive information, its residual net short needs. . .". (SDG&E Appeal, p. 2.) SDG&E stated that it procures on a quarterly and annual basis, and that revealing quarterly and annual procurement needs "threatens SDG&E's ability to achieve the best possible outcome for customers in negotiating supply arrangements." (*Id.* at p. 3.) SDG&E states that the NOI's exclusion of information from the first three years of the forecast is inadequate because SDG&E will still be making transactions at the quarterly and annual level in the future. Finally, SDG&E also stated that the Commission should follow the CPUC rulings and statutes in making determinations about confidentiality.

In response to the Commission's June 23, 2005 notice, on July 8 SDG&E filed testimony -- a declaration of Mike McClenahan -- in support of its appeal. In his declaration, Mr. McClenahan stated that bundled customers could be harmed by the release of procurement information by exposing them to higher prices than would otherwise be the case. (SDG&E Testimony, p. 1.) He specifically identified two types of information that allow others to secure a competitive advantage over SDG&E in negotiating procurement contracts: information about whether SDG&E needs to buy or sell electricity and a general idea of the magnitude of that need; and information about how much SDG&E values various goods and services. Mr. McClenahan did

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<sup>8</sup> As discussed above, the NOI does not affect information filed in Forms S- 3 – S-5.

not explain how that type of information is used to manipulate prices, but stated that evidence from energy markets justifies “taking a broad view of which bundled customer data is sensitive.” (*Id.* at p. 4.) He concluded that where market participants know what an IOU thinks future prices might be, offered prices will cluster around those prices rather than the suppliers’ actual costs; or, suppliers may avoid bidding at all in order to seek higher prices elsewhere.

On August 12, 2005, SDG&E filed rebuttal testimony, consisting of a second declaration of Mr. McClenahan. In this declaration, Mr. McClenahan stated that because SDG&E is currently procuring major capacity additions for 2009, releasing 2009 information could be harmful. SDG&E also asserted that the fact that commercial companies prepare their own IOU forecast information for purchase means that the aggregation tables have value as a trade secret. (SDG&E Rebuttal Testimony, p. 4.) SDG&E devoted a good deal of its rebuttal testimony to explaining why it believes the aggregation tables do not need to be released publicly, and to rebuttal of staff testimony about other western utilities that release planning data. (*Id.* at pp. 2, 9.) Finally, SDG&E asserted that the Commission staff has failed to provide proof that ratepayers will not be harmed, and that if there is doubt, the Commission should err on the side of protecting ratepayers. (*Id.* at p. 7.)

### SCE

SCE submitted supply information on March 3, 2005 and April 1, 2005. As did SDG&E, SCE asked for confidentiality for Forms S-1 – S-5. In addition, SCE asked for confidential treatment of a number of narratives it provided with the filings. SCE requested a confidentiality term of 15 years. With respect to Forms S-1 and S-2, SCE stated that the information on these Forms is confidential because its disclosure would give third parties an unfair competitive advantage, and/or would reveal SCE’s business strategy, and/or would disadvantage SCE in contract negotiations. (SCE Application for Confidential Designation of Electricity Resource Accounting Tables and Resource Planning Forms, March 1, 2005.) The application stated that the information could be used to calculate SCE’s forecasted energy or capacity needs, allowing third parties to charge a higher price when selling to SCE or depress the price when buying from SCE. SCE also argued that the Commission is bound by CPUC orders and statutes regarding protection of confidential data. (*Id.* at p. 3.) The Executive Director granted confidentiality for Forms S-1 and S-2 for a three year period for both the base case and the scenarios.

In its June 17, 2005, appeal of the NOI, SCE appealed release of aggregations of bundled customer annual capacity data, bundled customer quarterly capacity data, and bundled customer quarterly energy data. In the appeal, SCE included the preliminary comments of the three IOUs to a draft version of the aggregation proposal, and a declaration of Dr. Charles Plott, a professor of economics and political science at California Institute of Technology. Dr. Plott conducted an experimental economic analysis of the effect of disclosure of information on markets, which was attached to his declaration. SCE also included a declaration of Kevin Cini, who has primary responsibility within SCE for issues concerning SCE’s power purchases from conventional sources.<sup>9</sup>

The Plott Declaration and paper addressed Dr. Plott’s experiment in which he conducted laboratory market sessions, varying both the market design and the amount of information that

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<sup>9</sup> SCE also included several documents related to the NOI that do not contain any SCE arguments about the NOI.

was provided to bidders and buyers. He claimed that the results of this experiment support a conclusion that disclosure of demand information causes prices to increase. (SCE Appeal, Appendix 3, p. 1.) The Cini declaration was actually prepared for use in SCE's lawsuit against the Commission concerning the release of annual peak demand forecasts. In his declaration, Mr. Cini stated that the proposed release of the aggregation tables will make the release of the annual peak demand forecasts that is the subject of that lawsuit even more damaging. He also stated that if market participants are aware of the magnitude of SCE's "short" position for any particular period, suppliers could drive up the prices that ratepayers must pay for electricity. (SCE Appeal, Appendix 4, pp. 4-5.) Mr. Cini also testified that part of the aggregation proposal would result in the release of "complete information on the net short to market participants for 2009 and beyond in a simple format and a readily understandable format." (*Id.* at p. 6.) According to Mr. Cini, this provides a comprehensive assessment of SCE's market position.

SCE did not submit new testimony on July 8, instead resubmitting the June 17, 2005, appeal. On August 12, 2005, SCE submitted rebuttal testimony. The rebuttal testimony consisted of the testimony of Dr. Charles Stern, an economist, additional testimony of Dr. Charles Plott, and testimony of Mr. Stuart Hemphill, the Director of Resource Planning and Strategy for SCE. Dr. Stern's testimony (which was sponsored at the hearing by Mr. Hemphill) rebutted the testimony of staff witness Ms. Julia Frayer, by claiming that the effect of release of short-term demand information depends on the conditions of the market. (SCE Rebuttal Testimony, p. 3.) Dr. Stern also stated that conditions for tacit collusion are still present, in that there is a high concentration of suppliers with similar cost structures. (*Id.* at p. 6.) He also stated that there are significant barriers to entry, and that Ms. Frayer's testimony was contradictory. He is particularly concerned about the asymmetry of information release; that is, that the IOU information will be released, but not sellers' information. (*Id.* at p. 14.) According to Dr. Stern, misunderstandings about the California market and its vulnerability to manipulation render the staff conclusions about the effect of release incorrect. Instead, he concludes, both common sense and economic theory support a conclusion that release could result in a repeat of the conditions of the energy crisis of 2000 - 2001. (*Id.* at p. 17.)

In addition, Dr. Plott submitted further testimony on behalf of SCE, summarizing the results of additional experiments he conducted. His new studies, intended to mimic an auction process, evaluate the effect of releasing information about the quantity that a buyer plans to procure. (SCE Rebuttal Testimony, p. 25.) Fundamentally, he concluded that even without market manipulation, prices increase when suppliers know that buyers need to purchase a large amount of commodity rather than a small amount, whereas under the latter circumstances, prices decrease. (*Id.* at p. 26.) Dr. Plott also provided rebuttal to the testimony of staff witness Ms. Frayer. He disagrees with her about the number of suppliers, saying that auctions typically have a smaller number than the dozens that sell power in the California market; he also states that she is incorrect in identifying the demand function as a crucial variable in assessing the effect of information release. (*Id.* at p. 44.) Finally, he testified that Ms. Frayer misunderstands the role of information in common value auctions, by failing to distinguish between characteristics of a commodity and plans of the buyer. (*Id.* at p. 45.)

SCE also submitted the testimony of Stuart Hemphill, who indicated, in rebuttal to testimony of staff witness Dr. Michael Jaske, that there are significant differences between the California IOUs and other western utilities that release the type of planning information at issue in the NOI. He specifically identified reliance on contracts for meeting demand and risk of departing load as

significant differences. (SCE Rebuttal Testimony, p. 53.) Mr. Hemphill also identified differences between the California utilities and other non-western utilities in deregulated markets that disclose planning information. (*Id.* at pp. 58-59.) He stated that SCE has not made its customer demand and residual net short numbers publicly available. (*Id.* at pp. 59-60.) Finally, Mr. Hemphill stated that planning level information is sufficient for sending market signals and that policy preferences for meeting long-term demand needs can be established without ever disclosing the amount of these needs. (*Id.* at p. 62.)

### PG&E

PG&E applied for confidentiality for both its base case and scenario filings of energy and capacity data, initially requesting an indefinite term of confidentiality and with the later filing requesting a three-year term of confidentiality. PG&E stated that the data reveals PG&E's "net open", and its release would compromise PG&E's ability to obtain the most favorable terms in procurement for its customers. (PG&E Application for Confidential Designation of Electricity Supply Forms, March 1, 2005.) As with the other two IOUs, the Executive Director granted confidentiality for Forms S-1 and S-2 for both the base case resource plan information and the scenario resource plan information for a three-year period.

In its appeal of aggregations of bundled customer annual capacity data, bundled customer quarterly capacity data, bundled customer quarterly energy data, planning area quarterly capacity data, planning area quarterly energy data, and planning area quarterly capacity data with ranges, PG&E stated that release of the aggregation tables would undermine its negotiating position by providing information about PG&E's requirements. (PG&E Appeal, p. 2.) PG&E is particularly concerned about quarterly aggregations because they would provide market participants with information about the magnitude of PG&E's seasonal needs, which vary considerably, given PG&E's reliance on hydroelectric power. (*Id.* at p. 3.) PG&E asserted that public policy supports the confidentiality of this information, and that the Commission should treat this information in the same manner as the CPUC. (*Id.* at p. 6.) PG&E included several attachments in its appeal, including its formal comments to the CPUC on confidentiality issues in R.01-10-024, filed March 1, 2004. A declaration of James Shandalov was attached to the comments. In the declaration, Mr. Shandalov explained how he believes market participants would use various categories of information. Much of his testimony concerns information not at issue in this appeal – items such as gas hedging strategies, peak day resource needs, wholesale sales forecasts, and price information. However, Mr. Shandalov also discussed the relative benefit of hourly or monthly information compared to annual information. (PG&E Testimony, *Comments of PG&E on Confidentiality Issues*, Attachment A, pp. 4, 5, 7.) He also stated that if marketers know the exact amount of PG&E's "net open" position (the difference between supply and demand), they can obtain higher prices as the net open position increases. (*Id.* at p. 5.)

On July 13, 2005, PG&E submitted testimony consisting of Mr. Shandalov's declaration and a declaration of Roy Kuga, PG&E's vice-president for gas and electric supply. In his declaration, Mr. Kuga stated that the aggregation tables provide too much information, and would allow suppliers an unfair advantage. Mr. Kuga testified that the information provided in the Request for Offer (RFO) process, an auction process in which PG&E solicits competitive bids for various electricity products, provides sufficient information for the marketplace. (*Id.* at p. 2.) PG&E is particularly concerned about quarterly information, and Mr. Kuga stated that this is because if market participants learned what PG&E's exact seasonal market position is, they could negotiate

better prices. (*Id.* at p. 4.) Finally, Mr. Kuga stated that the risk isn't just about anti-competitive behavior, but also increasing the risk of losing customers who have supply options. Mr. Kuga recommended that the Commission follow the CPUC practice of aggregation and allowing examination of confidential data through non-disclosure agreements. (*Id.* at p. 5.)

PG&E's rebuttal testimony consisted of another declaration by Mr. Kuga. In this testimony, he stated that the Commission staff has not demonstrated that any harm would result from non-release of the aggregation tables. (PG&E Rebuttal Testimony, p. 2.) He believes it is important to understand that the Commission has access to the information it needs, that disclosure is not necessary for the Commission to fulfill its responsibilities, and that the debate is solely about public access to the information. (*Id.* at p. 3.) Mr. Kuga also testified that staff witness Ms. Julia Frayer misunderstands the California electricity market, as evidenced by her failure to evaluate the importance of deliverability constraints in negotiating electricity contracts. (*Id.* at p. 4.) He pointed out that PG&E is currently conducting long-term procurement activities and that the exclusion in the NOI of information about 2006 – 2008 is insufficient. (*Ibid.*) Mr. Kuga believes that the effect of disclosing the aggregations will be higher prices, and that the testimony of Commission staff witness Ms. Frayer is theoretical, and does not reflect the California market. (*Id.* at p. 8.) Finally, Mr. Kuga rebutted the testimony of staff witness Dr. Michael Jaske by stating that the information is not necessary for a public policy debate, as Dr. Jaske avers, and that the other publicly-available information referred to by Dr. Jaske does not include information that allows market participants to determine PG&E's requirements, particularly on a seasonal basis. (*Id.* at pp. 12, 13.)

#### Commission staff

As part of the NOI, Commission staff included a discussion of why it believes the aggregation proposal does not result in the release of confidential information. Staff noted that the confidential monthly data will not be revealed (aggregations will be quarterly and annual), and that the aggregated information could not be combined with other publicly available information to ascertain the monthly values. (NOI, p. 3.) Staff pointed out that the only category of resources in which the number of individual resources is small is utility-owned generation, and that there is a substantial amount of historical information publicly available about the generating characteristics of these units. (*Ibid.*) Staff noted that it agrees with the IOUs about the sensitivity of near-term values, and therefore proposes to release even the aggregated information only for the years 2009 and beyond. (*Ibid.*) The NOI also cites three additional factors as to why the aggregations are not confidential: 1) similar information is available; 2) the fact that the capacity forecast is only for a single unspecified hour of the year diminishes the value of the information; and 3) the IOUs have a range of options for meeting demand. (*Id.* at p. 4.)

Staff developed its arguments in considerable detail in its testimony filed on July 8, 2005. Staff identified several examples of supply-side information that is publicly available in California, and demonstrates its similarity to the information proposed to be released. (Staff Testimony of Dr. Michael Jaske, pp. 6-7.) Staff also pointed out that other utilities that conduct transactions in the same electricity market as the IOUs routinely disclose planning information, some of it at a more detailed level than the aggregated summary tables. (*Id.* at pp. 4-5.) Staff explained that it believes that the lack of specificity in the information to be released renders the risk of any economic harm extremely remote. Staff focused on the fact that near-term information is protected, and that the aggregated supply/demand balance information that would be disclosed

will have changed as a result of its review in this proceeding and in updates to forecasts, ongoing procurement activities, and other factors. Finally, Staff asserted that the release of long-term planning information in fact may have a positive effect on the market and hence on ratepayers, as it will provide information that reduces uncertainty for some of the sellers bidding in competitive procurement processes and level the playing field between more sophisticated market participants and those that are less informed, such as smaller suppliers and potential new suppliers. This would have the effect of adding capacity and increasing competition to serve demand. (Staff Testimony of Ms. Julia Frayer, pp. 26-30.)

Staff also filed extensive rebuttal testimony, consisting of an overview of the staff position, and eight attachments addressing different key aspects of the testimony. In the overview, staff stated that the IOU concerns about higher ratepayer prices are misplaced, and that the IOUs fail to adequately consider the safeguards that exist to protect against higher prices. (Staff Rebuttal Testimony, pp. 3-4.) Staff also testified that much of the publicly available information about the IOUs' market positions is inherently more damaging than that proposed to be released. (Staff Rebuttal, p. 6.) The attachments to the Rebuttal testimony describe the differences between the current market conditions and those that existed in 2000 and 2001 (Attachment A), summarize the RFO process and auction theory (Attachment B), describe similarities between California IOUs and other western utilities (Attachment C), identify information related to new market entry since 2001 (Attachment D), summarize the availability of public information about transactions, prices, and production (Attachments E – G), and identify the status of IOU compliance with a recent CPUC ruling on information disclosure (Attachment H). Fundamentally, staff argued that prices will not increase if the aggregation tables are released because they are not accurate enough to affect specific negotiations, especially in light of the multiplicity of options the IOUs have for meeting long-term needs. In addition, staff explained why existing public information is more likely to lead to such results, and why release of long-term planning information may have the effect of lowering process over time.

### IEP

IEP filed rebuttal testimony only. IEP began by stating that the best way to avoid market manipulation by suppliers is to release planning information far enough in advance that no single supplier can exercise an unfair advantage. (IEP Rebuttal Testimony, p. 1.) IEP testified that when RFOs are properly conducted, there are many bidders, making "gaming" is unlikely. (*Id.* at p. 3.) IEP mentioned that the IOUs' own projects may be competing against other supply options, and points out that IOU projects earn a guaranteed rate of return and have guaranteed cost recovery. (*Ibid.*) IEP stated that RFOs do not provide sufficient information about the types and timing of new resources that are needed, nor is regional or statewide information sufficient. Finally, IEP agreed with Commission staff that potential harm from market manipulation disappears when sufficient time is provided to allow new sources to be developed. (*Id.* at p. 5.)

## **GENERAL DISCUSSION**

### Public Records Act Guiding Principles

The Public Records Act was intended to safeguard the accountability of government to the public. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771-772 [192 Cal.Rptr. 415].) Because it serves this important public interest by securing public access to

government records, it is construed broadly in favor of access, and exemptions from disclosure are construed narrowly. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476 [23 Cal.Rptr.2d 412].) The Commission is using the information that is the subject of this appeal to establish important state energy policy, including both how much (and what kind of) electrical generation and transmission is necessary for the state's future. We believe there is a strong public interest in having the information underlying such policy decision-making accessible to the public and interested parties, rather than using a "black box" process not subject to public discussion or critique. This makes it all the more important that the Commission critically assess the general claim that information used in this process is a "trade secret" that derives economic value from not being made public. As can be seen in the discussion below, we have decided that the aggregated summary tables at issue in these appeals have no such value and, moreover, that their confidentiality would prevent interested persons from effectively participating in the Commission's public process.

### Trade Secret

At the outset, we believe it is important to identify the specific question we are addressing in this Order. Pursuant to the Public Records Act and the Uniform Trade Secrets Act, information is a trade secret and protected from release if it “derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.”<sup>10</sup> All three IOUs have repeatedly stated that the information contained in the aggregation tables is a trade secret because its release would disclose the amount of power they need (referred to in the IOU testimony as the residual net short or “RNS”), giving suppliers an advantage in negotiations for that power, thereby causing ratepayer costs to increase.<sup>11</sup> (SDG&E Appeal, p. 3; SCE Appeal, p. 4; PG&E Appeal, p. 2.) Therefore, the specific question we address in this Order is whether the release of the information in the aggregation tables would allow suppliers to charge more for power and for ratepayer costs to therefore increase.

In post-hearing briefs, the IOUs point out that the parties agree that release of the information would provide a benefit. (PG&E Post-hearing Brief, p. 2.) They state that even staff agrees that this benefit accrues to “third parties, primarily energy suppliers. . .”. (*Ibid.*) The implication of this statement appears to be that the staff position supports a finding that the information creates economic value to suppliers, and therefore, that the data meets the definition of a trade secret. PG&E subsequently goes even further, providing its own opinion that information should be withheld if it merely “affects energy markets.” (PG&E Post-hearing Brief, p. 11.)

We do not agree that if release of the information has *any* beneficial effect on energy markets, or even would create economic benefits in the form of reducing barriers to entry, the definition of a trade secret has been met. In determining whether the information “[d]erives independent economic value. . . from not being generally known” (Civ. Code, § 3426.1, subd. (d)(1)) and therefore potentially qualifies as a trade secret, we must consider who possesses that value.

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<sup>10</sup> The second part of the trade secret test – whether the IOUs have made reasonable efforts to maintain the secrecy of the data – is not at issue in this appeal.

<sup>11</sup> The IOUs also state that their concerns extend to their sales of surplus electricity in the wholesale market, as buyers can use information about the IOUs’ position in the market to force the IOUs to accept lower prices. Although we refer only to purchases in this Order, our conclusions also apply equally to IOU sales.

Three legal considerations and one policy consideration indicate that the “economic value” must accrue to the holder of the information.

First, the statutory definition of “trade secret” requires that the information “[d]erives independent economic value . . . from not being known *to the public or to other persons . . .*” (Civ. Code, § 3426.1, subd. (d)(1), italics added.) This indicates that the “economic value” of withholding the information must be “derived” by someone other than “the public” or “other persons” – i.e., by the person who possesses the information.

Second, the legal consequences of “trade secret” status also indicate that the “economic value” must accrue to the holder of the information. If information held by party A were a trade secret merely because its release would benefit party B, even though its release would not harm party A, then it would make no sense to give party A the legal right to withhold the information. Yet PG&E’s interpretation would create that result. Holders of information that qualifies as a “trade secret” enjoy a legal privilege that allows them to keep the information confidential even if the information would provide legally relevant evidence in a court proceeding. (Evid. Code, § 1060.) Such a privilege makes sense only if the holder would be damaged by the release of the information.

Third, trade secrets are a kind of property right (*DVD Copy Control Association Inc. v. Bunner* (2003) 31 Cal.4<sup>th</sup>, 864, 880 [4 Cal.Rptr.3d 69, 83]), which again indicates that it is the *owner* of the information -- in this case the IOUs -- that must demonstrate that they benefit from withholding the data (that is, that they suffer harm in the form of higher ratepayer prices as a result of its disclosure) in order to make a successful trade secret claim.

Finally, we reject an interpretation of the term “trade secret” that would require this Commission -- charged with facilitating efficient and reliable energy markets (Pub. Resources Code § 25301, subd. (b)(5)) -- to withhold information whose release both does not harm the IOUs and improves the efficiency of the electricity market. We also note that improvements in market competitiveness and efficiency do not mean that suppliers will benefit; some may benefit, but the effect on any particular market participant and even whether any market participant will enjoy a benefit is very speculative. Although we can not predict the effect of the information on individual market participants, this fact does not prevent us from concluding that availability of long-range planning information should benefit the electricity market generally.

#### *The Nature of the Information and the Current Procurement Environment Undermines the IOUs’ Claims*

Determining whether the aggregation tables are a trade secret requires us to accurately define the information contained in the tables and to identify how it could be used by other market participants. Specifically, we must ascertain whether the information is sufficiently detailed and sufficiently accurate that when released, it could have a material effect on the bidding strategies of the suppliers competing to meet the IOU needs identified in the tables. We bring to this discussion our collective years of experience with energy issues and familiarity with the evolution of the California electricity market during the past decade.

To begin, we ask whether the aggregation tables would provide other market participants with new information about the amount of electricity the IOUs will need to purchase. All parties



agree that the aggregation tables will identify *some* new information about how much energy and capacity will be needed on a quarterly and annual basis beginning in 2009. However, that answer does not justify confidentiality. The second, and more important, question is whether the additional information in the aggregation tables affects the bargaining power of the IOUs vis-à-vis their potential suppliers (and purchasers), resulting in increased ratepayer costs. After careful consideration of all the evidence presented, we conclude that the answer is no, for several reasons.

First, the aggregation tables do not identify the actual procurement targets that the IOUs will use to meet customer demand in 2009 and beyond. As staff testified, the information is simply input into a planning and procurement regulatory process, and will be subject to adjustments at both the Commission and the CPUC, as well as by the IOUs themselves as their market position shifts over time. (8/24/05, Reporter's Transcript [RT], p. 204.) Thus, the series of forecasts that would be released pursuant to the NOI would show trends in supply and demand for 2009 – 2016, but would not be directly correlated to the demand that is governing their actual resource selection. (*Ibid.*) Even the IOUs agreed that the actual procurement targets will be established by the CPUC as part of its procurement proceeding, and will be further refined as the IOUs obtain additional resources. (8/24/05, RT, pp. 58, 142, 156.) This lack of direct correlation between the information in the aggregation tables and the actual procurement targets is not reflected in the IOU testimony, undermining its persuasiveness. We find that the IOUs, in stating that the tables would disclose “exactly how much is needed” (PG&E Testimony, p. 2), are not fairly characterizing the contents of the aggregation tables.

The IOUs attempted to address this issue by pointing out that the information in the aggregation tables represents their best estimates as of the time the submittals were prepared earlier this year, and that there may not be significant changes between then and the time that procurement activities to meet those targets are undertaken. In fact, two of the IOUs are currently undertaking resource acquisition activities to meet a portion of their needs for 2009 and beyond. (SDG&E Rebuttal Testimony, p. 1; PG&E Rebuttal Testimony, p. 4.) Taken together, according to the IOUs, these facts indicate that suppliers could now or in the future use information from the aggregation tables to charge more for the three, five, and ten year contracts the IOUs are seeking. (*Ibid.*) We disagree. The information in the aggregation tables does not inform suppliers about the IOUs' exact needs in 2009 (or any other year of the forecast), nor about how they plan to meet that need in any specific procurement activity.<sup>12</sup>

Second, the CPUC has provided the IOUs with a broad range of options for meeting its long-term demand needs. They can conduct multiple Requests for Offers (RFOs) and enter into contracts for short-term, medium term, and long-term products. (Staff Testimony of Dr. Michael Jaske, p. 8.) They control their own generating resources, and can build new generation if they cannot find attractively priced power in the market in 2009 and beyond, as well as develop demand-side options. (Staff Rebuttal testimony, p. 5, Attachment B.) Moreover, in the RFO process, potential sellers market a variety of products to the IOUs that vary by price, location of electricity delivery, by the duration of the contract, and by the amount and type. (*Ibid.*) We agree with staff that this broad range of options makes demand elastic over time (8/24/05 RT, p.

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<sup>12</sup> In response to claims that this information will provide an economic benefit to suppliers in the future, we note that under the Executive Director's determination, all the data in tables S-1 and S-2 will be publicly available in three years. None of the IOUs appealed this aspect of the Executive Director's determination and it is not before us as part of their appeal.

207), so that even if a supplier did know “exactly how much was needed” at any given time, he or she would not be able to exercise any competitive advantage derived from that information. Only when a supplier knows that the IOUs have limited options for meeting a specified level of demand for a specific timeframe near enough to preclude the development of other options will knowing the quantity of demand confer a competitive advantage.

The IOUs countered the staff testimony by stating that the number of RFOs it can enter into is limited, because of the amount of time and resources that are required for each RFO. (SDG&E Post-hearing Brief, p. 13.) They also state that the difficulty associated with acquiring a license for generation resources makes the self-building option unattractive. (8/24/05 RT, p. 62.) However, we believe the fact that seven RFOs have been issued since 2004 (Staff Rebuttal Testimony, Attachment B, p. 7) strongly indicates that the IOUs may be overstating the difficulty in using the RFO process to obtain low-cost resources. In addition, the more than 9,000 MW of new capacity that has come on line since 2001 demonstrates that new generation resources can be and are being licensed and constructed. (Staff Rebuttal Testimony, Attachment D.) In fact, we are aware that the IOUs have recently obtained new generating resources, and, as pointed out by the IEP witness, construction of utility-owned facilities approved by the CPUC can earn a rate of return of 11½ percent for IOU shareholders, presumably making them an attractive option. (IEP Rebuttal Testimony, p. 3.) In sum, the lack of accuracy in the aggregation tables combined with the broad range of options the IOUs have for meeting demand means that disclosure of the aggregated tables will not provide new information that allows suppliers to charge more for electricity than would be the case without their release.

Moreover, we believe the release of similar or more detailed information by other California utilities and western utilities operating in the same market is a powerful indication that the release of this information does not cause suppliers to bid higher, thus leading to rate increases. We must assume that these other utilities take actions to avoid paying unnecessarily high prices; if disclosing their needs to the same suppliers from whom the IOUs are buying caused those suppliers to increase prices, we would not expect to see this level of disclosure. Nor are we persuaded that there are significant differences between those utilities and the California IOUs, as the latter claim. Even if the differences cited by the IOUs exist (and Commission staff testified that they do not [Staff Rebuttal Testimony, Attachment C]), the IOUs failed to provide any persuasive testimony explaining why these differences would logically result in a conclusion that release of planning information provides no competitive advantage over other utilities in the California market, but does create significant competitive advantage over the California IOUs.

#### *The Public Availability of Other IOU Information Is Relevant To Our Determination*

Parties provided considerable testimony about the availability of other IOU information. The staff states that the existence of this information must be considered when evaluating the IOUs’ claims that the information in the aggregation tables is a trade secret. (Staff Rebuttal Testimony, p. 6.) The IOUs agree that this information is available, but point out that it is different from the aggregation tables, and claim that the proposed aggregations, derived from the IOUs’ own forecasts, are entitled to protection. (PG&E Rebuttal Testimony, p. 6.) While we accept that the publicly available information is different than that identified in the aggregation tables, we must assess the claim of ratepayer harm from release of the aggregation tables in light of the availability of this other information. For example, the wealth of historical and forecast IOU data identified by Commission staff (Staff Testimony p. 6; Staff Rebuttal Testimony,

Attachments E, G) clearly allows market participants to make very sophisticated estimates of the IOUs' market positions over time. This necessarily means that the aggregation tables have a dramatically reduced effect on the relative competitive advantages held by various market participants than would occur if this data were not available. Of particular significance is that much of the publicly available data is the IOUs' own information. Given that it represents either their own long-term forecasts developed for transmission planning purposes, or their actual historical data, we do not believe that aggregations of long-term forecast data will change market participants' understanding of IOUs' position in such a way as to affect contractual negotiations.

Not only do we believe that the incremental effect of the release of the aggregation tables is negligible in light of the existing available information, we agree with staff that much of the information already released by the IOUs is in fact much more likely to affect bidding strategies than long-term forecast information. In particular, the data identified in the Electronic Quarterly Reports mandated by the Federal Energy Regulatory Commission, and the Energy Information Agency Form 906 provide a great deal of information about the IOUs' market position--including historical production of certain IOU generating facilities, and type, quantity, price, and the point of delivery for every transaction during the preceding quarter (Staff Rebuttal Testimony, Attachment E and G.). The aggregation tables provide new information about long-term supply/demand trends, but in light of the abundance of publicly available short-term forecast and historical data, they are not likely to negatively affect the IOUs' bargaining positions.

#### *The IOU Testimony is Unpersuasive*

Nor are we persuaded by the evidence offered by the IOUs. Their testimony consisted generally of comparisons to the 2000 – 2001 energy crisis, experimental studies conducted by an economist at the California Institute of Technology, and declarations that economic theory indicates that release of the aggregation tables would cause ratepayer harm. They also raise claims of unfairness and state that the Commission should defer to the CPUC on certain confidentiality issues. We address these issues sequentially.

#### *Release Of Planning Information Will Not Cause A Repeat Of The 2000 – 2001 Energy Crisis*

Several IOU witnesses offer the 2000 – 2001 energy crisis as support for their claims that release of the aggregation tables could increase prices paid by ratepayers for electricity. (PG&E Testimony of Mr. Roy Kuga, p. 2; SCE Rebuttal Testimony, p. 17.) We believe that this testimony ignores the significant changes that have occurred in procurement environments, market structure, and data disclosure practices since 2000 and 2001, which renders the testimony unpersuasive. Simply put, we do not believe that the conditions that led to the energy crisis of 2000 – 2001 will be re-created as a result of the release of the aggregation tables.

The staff testimony clearly delineated the significant differences between the current situation and those that existed in 2000 and 2001. In 2000 and 2001, the IOUs were required to purchase virtually all of their energy through short-term markets, and they were forced to sell the output of their own generating facilities into the same market. (Staff Testimony of Dr. Michael R. Jaske, p. 8; Staff Rebuttal testimony, Attachment A, p. 6.) Electricity prices were dominated by these

short-term purchases, and the IOUs effectively had no ability to enter into new long-term contracts. (*Id.*) As a result, when the short-term price of electricity rose, the IOUs were forced to pay the higher prices for virtually all of the electricity needed to serve their loads. The lack of flexibility in procurement options deprived the IOUs of any ability to utilize other market forums and avoid the high price short-term market. Such is not the case today. The IOUs have many demand-side and supply-side alternatives.

The IOUs claim that there are also significant similarities between the conditions extant in 2000 and 2001 and the conditions currently present; namely, the limited number of suppliers and the “nearly vertical demand curve.” (SCE Rebuttal Testimony, p. 17.) However, we find staff’s testimony persuasive that there are more market participants currently than in 2000 and 2001, and that the Federal Energy Regulatory Commission has determined that the generation market in which the IOUs are currently procuring is competitive. (Staff Rebuttal Testimony, Attachment A, p. 9; 8/24/05 RT, p. 222.) We also believe that the demand curve *over time* is not “nearly vertical”; in fact, given the alternatives each IOU has for meeting long-term resource needs and the increased number of new market participants, demand is, in fact, quite elastic for any given IOU procurement effort. Simply put, we do not believe that the energy crisis of 2000 and 2001 is evidence that release of long-term planning information will cause the price of electricity to increase.

*Dr. Plott’s Experiments Do Not Offer Relevant Information About The Effect Of The NOI*

SCE’s witness Dr. Plott submitted the results of several series of experiments in which he monitored the prices charged for a commodity while changing the amount of information made available to the market participants. His direct testimony summarized the results of one set of experiments, while his rebuttal testimony summarized a different set of experiments. The conclusions he reached about the two sets of experiments differed, leading staff to state that, “[t]he only conclusion that can be drawn from a comparison of these two statements is that the assumptions about the market used in designing the experiment dramatically affect the results.” (Staff Post-Hearing Brief, p. 11.) We agree, and for the reasons stated below, conclude that Dr. Plott’s experiments failed to incorporate a market design that reflects the actual conditions found in the California market.

For example, Dr. Plott failed to consider the effect of new entry in evaluating the impact of information release on prices – despite the fact that California has seen more than 9,000 MW of new entry in the past four years. (Staff Rebuttal Testimony, Attachment D.) Dr. Plott also testified that aggressiveness of bidding increases with the number of competitors (SCE Rebuttal Testimony of Dr. Plott, p. 39), and that an increase in the number of sellers would reduce the price paid by buyers. (8/24/05 RT, p. 78.) Dr. Plott’s failure to evaluate the actual California market conditions that he testified would create price reductions is a fatal flaw, and leads us to conclude that his study provides no valuable information about the effect of release of the aggregation tables. Moreover, Dr. Plott did not even evaluate release of the same type of information that would be released in the aggregation tables. He did not evaluate the effect of disclosing demand information over time (8/24/05 RT, p. 76), or changes in the supply mix over time (*ibid.*). He did not distinguish between energy and capacity information in his study (*ibid.*), notwithstanding the fact that the IOUs are appealing the release of annual and quarterly capacity information – *not* annual energy information. Apparently, these distinctions are beyond the scope of his experiments. However, these distinctions are fundamental components of the

aggregation tables, and Dr. Plott's failure to evaluate them renders the conclusions of his study inapplicable to the question of the effect of their release.

Finally, we note that although Dr. Plott testified that he possesses "special knowledge, skill, experience, training and education necessary to form an opinion on the topic of information disclosure and its effect on the California electricity market (SCE Testimony, Appendix 3, p. 1), Dr. Plott was unable to answer basic questions about the structure of the current California electricity market. (8/24/05 RT, p. 69, 81.) Given the discrepancies between actual market conditions and the assumptions in his study, we are not surprised by this testimony, but regard it as yet further evidence that we cannot rely on his conclusions about the effect of disclosure of the aggregation tables.

*IOU Testimony On Shortages Does Not Support A Decision To Withhold The Aggregations*

SCE provided testimony that prices will increase any time suppliers know that resources are limited. (SCE Rebuttal Testimony, pp. 28-29.) As a result, they oppose releasing certain resource plan information because they believe it will allow suppliers to know when those conditions will occur, thereby leading to higher prices. (*Ibid.*) We agree that when suppliers know that resources are limited and the IOUs have limited options for meeting demand, they may increase bids. However, we do not believe that the aggregation tables identify situations of tight supply during a timeframe within which the IOUs have limited options for meeting demand. As discussed above, we believe that that lack of accuracy about specific needs in the 2009 – 2016 timeframe, combined with the range of options the IOUs have for meeting these long-term needs, including utilization of the considerable generating and transmission capacity that has been added to the state, render demand elastic over the long-term. We find that although the aggregation tables indicate long-term trends in the supply/demand balance, they do not reveal accurate levels of needs that the IOUs must meet in the short term through a limited number of procurement efforts. Thus, although we agree with the general concept that shortages in times of tight supply and limited alternatives can lead to higher prices, we do not believe that release of the aggregation tables for 2009 -2016 will identify whether or when those conditions would be present.

*Asymmetrical Information Release Does Not Mean The Aggregation Tables Are A Trade Secret*

One of the grounds for the IOU opposition to release of the aggregation tables is that the information release is asymmetrical. The IOUs are concerned about the fact that the Commission is not, in the NOI, proposing to release either supplier information or comparable ESP information. (SCE Rebuttal Testimony, p. 14.) In the first place, the IOUs' argument ignores the fact that the publicly-owned utilities (with one exception) never requested confidential treatment of Forms S-1 and S-2, which are therefore already publicly available. In addition, while we understand that the IOUs believe that the NOI isn't "fair", our mandate is not to symmetrically release information. Rather, our mandate includes providing a comprehensive analysis of the state's energy situation in a way that is useful to the Governor, the Legislature, and to other agencies making energy-related decisions, facilitating efficient and reliable energy markets, and conducting the IEPR proceeding in a manner that protects confidential information. The Commission has determined that release of the aggregation tables is the best way to meet

these mandates. Release of additional ESP information and seller information is not.<sup>13</sup> We have also determined that the information contained in the aggregation tables is not a trade secret, and is not entitled to confidentiality protection.

*The IOUs Misstate the Relationship of the Commission and the CPUC*

In determining whether the aggregation tables will cause ratepayer prices to increase and therefore are entitled to protection under the Public Records Act, we must address IOU claims that our statutory obligations are affected by the manner in which our sister agency, the CPUC, has addressed confidentiality. All three utilities urge that the Commission coordinate its confidentiality determinations with the CPUC as that agency considers confidentiality issues in its recently-instituted Order Instituting Rulemaking (OIR). SDG&E claims that the Commission should take no action that would presuppose the outcome of the OIR (SDG&E Rebuttal Testimony, p. 11), and PG&E claims that the Commission is “prohibited” from releasing the aggregation tables pursuant to Public Utilities Code Section 454.5(g) and CPUC confidentiality rulings (PG&E Post-Hearing Brief, p. 7).

The Commission wholeheartedly supports the IOUs’ objective of consistency between this Commission and the CPUC. To that end, the Commission is considering participating as a party in the CPUC’s confidentiality OIR. However, our participation there does not excuse us from our obligation to address confidentiality issues here at the Commission as they arise. We cannot, as SDG&E suggests, take no action on confidentiality issues; we have a legal obligation to decide whether to release the aggregation tables or to withhold them. We also cannot defer to the CPUC’s OIR process, particularly when the CPUC has issued no decisions about the confidentiality of any of the information that will be addressed in the OIR. Nor are we bound by past CPUC decisions made under its own statutes. Here, our legal obligation is to consider the evidence before us and to exercise our best professional judgment in determining whether the IOUs have demonstrated that the information contained in the aggregation tables is a trade secret. That is precisely what we have done in this Order.

*The Information is Needed for Planning Purposes and May Provide Benefits*

The question of the need for the aggregation tables does not arise in a consideration of whether they are a trade secret or not. However, several IOUs also state that even if the information is not found to be a trade secret, the Commission should consider whether it is entitled to protection under the Public Records Act because “the public interest served by not disclosing the record ‘clearly outweighs’ the public interest served by disclosure of the record.” (Gov. Code, § 6255, subd. (a).) Therefore, we address whether there are benefits associated with release of the aggregation tables.

As discussed above, one of the mandates applicable to the Commission’s IEPR process is that the Commission “facilitate efficient and reliable energy markets.” (Pub. Resources Code, § 25301(b)(4) and (5).) In testimony at the hearing, there was a great deal of discussion about both

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<sup>13</sup> Moreover, when cross-examined on the effect of releasing information about seller’s costs to the IOUs (i.e., the buyers in the RFO process), staff provided persuasive testimony that this would not increase competition or otherwise change the scope of competition between suppliers. Thus, in addition to not being necessary to fulfill our mandate, it appears that releasing seller information to the IOUs would not have a material effect on the competitiveness of the RFO process.

the need for the information and the question of whether its release would provide long-term economic benefits. We firmly believe that long-term planning information, such as the information contained in the aggregation tables, is essential in meeting our mandate to develop sound energy policy. Without information reflecting the forecasts and perspectives of the IOUs, we would not be able to understand long-term trends in the supply/demand balance, and to evaluate options for addressing any imbalances. Moreover, it can take several years to plan, permit, and construct new powerplants, and to implement comprehensive demand-side management programs. (Staff Testimony of Dr. Jaske, p. 3.) Thus, we must consider long-term information in developing realistic policy preferences in the IEPR process. And, as discussed above, responsible and effective electricity resource planning cannot occur without including the public. In fact, our enabling legislation, the Warren-Alquist Act, specifically directs the Commission to provide significant opportunities to the public in the development of the Integrated Energy Policy Report. (*See*, Pub. Resources Code § 25306) Therefore, the aggregation tables provide valuable information in our IEPR process. We consider this a significant benefit.

In addition, we are committed to provide useful information to the CPUC for it to use in its 2006 procurement proceeding. The increased coordination between this Commission and the CPUC helps ensure consistency between agencies in evaluating energy issues, and results in a much more efficient use of limited resources than if the same issues are addressed separately. Consideration of IOU-specific and bundled customer-specific information is valuable in carrying out our responsibilities in this regard, and therefore provides an important public benefit.

Finally, staff testified that the aggregation tables may create ratepayer benefits by reducing uncertainty and leveling the playing field between well-informed, sophisticated market participants, and the smaller market participants and less informed potential new entrants. Although the IOUs devoted much of their rebuttal testimony to challenging this conclusion, we believe that the IOUs' arguments are based on a misunderstanding about how economic theory applies specifically to the release of the aggregation tables. We find that the discussion in the staff brief of this issue is persuasive and that the weight of the evidence indicates that the release of the aggregation tables into the current California electricity market may increase its competitiveness.<sup>14</sup>

In light of the positive effects of disclosure just discussed and the fact that we do not believe that disclosure is likely to cause harm in the form of higher prices for ratepayers, we find that the public interest served by not disclosing the record *does not* clearly outweigh the public interest served by disclosure of the record. The aggregation tables may not be withheld under this public interest balancing test.

## **SPECIFIC AGGREGATION PROPOSALS**

With these general observations in mind, we now turn to the specific aggregation proposals under appeal:

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<sup>14</sup> We also agree with staff that RFO information, while useful for sending market signals, will not be as effective as the aggregation tables. The RFOs simply do not allow sufficient time between release and response to make a careful evaluation of whether or where a new generating facility would be a prudent investment. (Staff Rebuttal Testimony, Attachment B, pp. 12-13; IEP Rebuttal Testimony, p. 4.)

### Bundled Customer Annual Capacity Data

All three IOUs appealed release of aggregations of bundled customer annual capacity data. These aggregations will identify the highest hourly load during the year and the resources currently available to meet that load. The aggregated information is critical to evaluating California's electricity future. Knowing the general magnitude of supply/demand balances on a peak-needs-versus-available-capacity basis allows policy makers to determine how best to meet any shortfalls. However, we believe that the lack of specificity about when that hour will occur in the year makes it extremely unlikely that aggregations of annual capacity data will shift any party's competitive advantage in negotiating sales or purchases with an IOU. As discussed above, we also find that the aggregation tables, which represent the initial IOU submittals into the planning process, are not particularly accurate, given both the IOUs' on-going procurement activities and the fact that the first three years are fully protected. This fact, combined with the options available to the IOUs for meeting long-term annual capacity needs, renders release of this aggregation harmless to ratepayers.

Finally, we respond to IOU assertions that release of bundled customer information is more harmful than release of planning area information and is not necessary for our planning purposes. We agree that bundled customer information is more disaggregated than planning area information. However, this fact does not necessarily lead to a conclusion that it is entitled to confidential protection. It is common knowledge that the IOUs' customers constitute about 80 – 85% of the load in the three planning areas. Any surpluses or deficits on a planning area basis are therefore largely attributable to the IOUs, as they are so dominant. Further, the long-term planning data for the publicly-owned utilities -- whose customers constitute much of the rest of the load in each planning area -- is already public because those utilities did not (with the exception of Imperial Irrigation District [IID]) request confidentiality. (IID did agree to the release of aggregated information pursuant to the NOI.) For these reasons, plus the reasons stated above, release of aggregations of bundled customer data in this aggregation table will not cause ratepayer prices to increase and we find that the aggregation tables do not contain trade secrets. We also find that the aggregation tables will help us to provide appropriate recommendations to the CPUC and may send useful signals to market participants about the type of long-term investments that may be prudent. Therefore, the public interest in non-disclosure of this information *does not* clearly outweigh the public interest in disclosure.

### **Findings of Fact:**

1. In March and April, 2005, the IOUs filed resource plan data in response to Commission Orders issued as part of the Commission's 2005 Integrated Energy Policy Report proceeding. The IOUs included requests for confidentiality for virtually all of these filings.
2. Within 30 days of each resource plan filing, the Commission's Executive Director granted the requests for confidentiality, although the period of confidentiality was shorter than requested in some instances. None of the IOUs appealed the Executive Director's determinations to release the data in the future.



3. On June 3, 2005, the Executive Director issued a Notice of Intent to Release Aggregated Data (NOI), which identified ten different proposals to aggregate the confidential resource plan data for current public release.
4. On June 17, 2005, the IOUs filed individual appeals of the NOI, with each IOU appealing a different set of aggregation proposals. SDG&E appealed the following aggregations: bundled customer annual capacity, bundled customer quarterly capacity, and planning area quarterly capacity. SCE appealed bundled customer annual capacity, bundled customer quarterly capacity, and bundled customer quarterly energy. PG&E appealed bundled customer annual capacity, bundled customer quarterly capacity, bundled customer quarterly energy, planning area quarterly capacity, planning area quarterly energy, and planning area quarterly capacity with ranges.
5. On June 23, 2005, the Commission issued a notice stating that a hearing would be held on July 13, 2005 and that any interested person could present testimony on July 8, 2005. Subsequently, the Commission issued another notice on July 22, 2005, directing the filing of rebuttal testimony to persons identified on a service list on August 12 and stating that a Commission hearing on the appeals would be held on August 24, 2005.
6. The three IOUs, staff, and the Independent Energy Producers Association (IEP) filed rebuttal testimony on August 12, 2004.
7. The Commission held an evidentiary hearing on August 24, 2005.
8. The aggregation tables of bundled customer annual capacity data identify only the amount of demand for the single hour of the year with the highest demand, and by themselves, provide no information about *when* peak demand will occur, or the relationship of that hour to any other hour of high demand. Nor does the information inform market participants of the expected duration of the peak, which could influence the ability of the IOUs to meet peak demand in a variety of ways other than purchasing an entire quarter's worth or an entire year's worth of capacity.
9. The aggregation tables of bundled customer annual capacity data show trends in supply and demand for 2009 – 2016, but are not directly correlated to the demand that is governing the IOUs' actual resource selection. Rather, the information is simply input into a planning and procurement regulatory process, and will be subject to adjustments at both the Commission and the CPUC, as well as by the IOUs themselves as their market position shifts over time.
10. The IOUs have a broad range of options for meeting their long-term demand needs, making their demand for both energy and capacity elastic over time. Under these conditions, release of the aggregation tables of bundled customer annual capacity data for the 2009 – 2016 timeframe is not likely to allow a supplier or group of suppliers to exercise a competitive advantage over the IOUs in electricity purchase or sales negotiations.
11. The release by other California and western utilities operating in the same market of similar or more detailed information than that contained in the aggregation tables of

bundled customer annual capacity data is a powerful indication that the release of the information will not cause rate increases.

12. Because the IOUs routinely provide long-term forecasts for transmission planning purposes, as well as actual historical data in other forums, market participants can make very sophisticated estimates of the IOUs' market positions over time. As a result, we do not believe that aggregation tables of bundled customer annual capacity data will change market participants' understanding the IOUs' position in such a way as to affect contractual negotiations.
13. The IOUs testimony referencing the 2000 and 2001 energy crisis and Dr. Plott's experiments does not support a conclusion that release of the aggregation tables of bundled customer annual capacity data will cause ratepayer prices to increase because the market conditions underlying both the prior crisis and Dr. Plott's experiments are very different from those under which the IOUs are currently procuring.
14. The fact that the Commission is not releasing seller or other ESP information along with the aggregation tables of bundled customer annual capacity data does not change the effect of releasing the latter and therefore does not support a claim that the latter are a trade secret.
15. The aggregation tables of bundled customer annual capacity data provide a benefit to the public by allowing for public participation in the State's energy policy proceeding, by providing input into the CPUC's procurement process, and by sending market signals regarding the appropriate timing, location, and quantity needed of new generation and/or energy efficiency and demand response programs.

#### **Conclusions of Law:**

1. The Public Records Act was intended to safeguard the accountability of government to the public and should be construed broadly in favor of access. In addition, there is a strong public interest in having the information underlying such policy decision-making accessible to the public and interested parties, rather than using a "black box" process not subject to public discussion or critique. Thus, the Commission must critically assess the general claim that information used in this process is a "trade secret" that derives economic value from not being made public.
2. Resource plan data filed by the IOUs in March and April of 2005 are public records.
3. The Commission may withhold the records from disclosure if it finds that the records derive independent economic value from not being generally known to the public or to other persons who can obtain economic value from their disclosure or use, and are the subject of efforts that are reasonable under the circumstances to maintain their secrecy, or if the Commission finds on the facts of the particular case that the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the records (including finding that the competitive advantage accruing to the IOUs from non-disclosure -- if it exists -- does not outweigh the public interest in a transparent energy policy development process).

4. Because release of aggregation tables of bundled customer annual capacity data will not cause the IOUs to lose an economic advantage or other market participants to gain an economic advantage vis-à-vis the IOUs, the IOUs have not made a reasonable argument that this information is a trade secret, or that the public interest in non-disclosure clearly outweighs the public interest in disclosure.
5. The Commission is not the agent of the CPUC in ruling on these appeals, is not bound by prior CPUC decisions on confidentiality, and is legally obligated to make its decision based on the evidence in this record.
6. This proceeding has been conducted in conformity with applicable provisions of the Commission's regulations governing disclosure of information, the requirements of the Integrated Energy Policy Report, and the provisions of the Public Records Act.

#### *Bundled Customer Quarterly Capacity*

All three IOUs appealed release of aggregations of bundled customer quarterly capacity data. We begin this discussion by noting that quarterly information may pose a greater potential for harm than annual information because it reveals an IOU's market situation over a shorter period of time. However, this prospect does not necessarily lead to a conclusion that it is entitled to confidential protection. In addressing this issue, we considered the fact that discerning the amount of capacity needs from quarter to quarter would require not only the information in the aggregation table, but also the expiration of contracts in each quarter. (Staff Testimony of Dr. Michael Jaske, p. 13.) This information is not proposed to be released, and in fact would be very hard to estimate for three years out – when the aggregation first identifies quarterly capacity information. After careful consideration, we find that these facts, combined with the facts identified in our discussion regarding release of bundled customer annual capacity information, also apply to the quarterly information, and support a finding that release of quarterly capacity information will not result in higher prices for ratepayers. Similarly, because of its usefulness in providing market signaling and increasing understanding of how various categories of resources that vary over the year fit IOU needs, the public interest in non-disclosure of this information does not clearly outweigh the public interest in disclosure.

#### **Findings of Fact:**

1. We incorporate by reference Findings of Fact 1 – 7 above from our discussion of bundled customer annual capacity information.
2. The aggregation tables of bundled customer quarterly capacity data identify only the amount of demand for the single hour of the quarter with the highest demand, and by themselves, provide no information about *when* peak demand will occur, or the relationship of that hour to any other hour of high demand. Nor does the information inform market participants of the expected duration of the peak, which could influence the ability of the IOUs to meet peak demand in a variety of ways other than purchasing an entire quarter's worth or an entire year's worth of capacity.
3. The aggregation tables of bundled customer quarterly capacity data show trends in supply and demand for 2009 – 2016, but are not directly correlated to the demand that is

governing the IOUs' actual resource selection. Rather, the information is simply input into a planning and procurement regulatory process, and will be subject to adjustments at both the Commission and the CPUC, as well as by the IOUs themselves as their market position shifts over time. Moreover, discerning the amount of capacity needs from quarter to quarter would require not only the information in the aggregation table, but also the expiration of contracts in each quarter. This information is not proposed to be released, and in fact would be very hard to estimate for three years out – when the aggregation tables first identify quarterly capacity information.

4. The IOUs have a broad range of options for meeting their long-term demand needs, making their demand for both energy and capacity elastic over time. Under these conditions, release of the aggregation tables of bundled customer quarterly capacity data for the 2009 – 2016 timeframe is not likely to allow a supplier or group of suppliers to exercise a competitive advantage over the IOUs in electricity purchase or sales negotiations.
5. The release by other California and western utilities operating in the same market of similar or more detailed information than that contained in the aggregation tables of bundled customer quarterly capacity data is a powerful indication that the release of this information does not cause rate increases.
6. Because the IOUs routinely provide long-term forecasts for transmission planning purposes, as well as actual historical data in other forums, market participants can make very sophisticated estimates of the IOUs' market positions over time. As a result, we do not believe that aggregation tables of bundled customer quarterly capacity data will change market participants' understanding the IOUs' positions in such a way as to affect contractual negotiations.
7. The IOUs' testimony referencing the 2000 and 2001 energy crisis and Dr. Plott's experiments do not support a conclusion that release of the aggregation tables of bundled customer quarterly capacity data will cause ratepayer prices to increase because the market conditions underlying both the prior crisis and Dr. Plott's experiments are very different from those under which the IOUs are currently procuring.
8. The fact that the Commission is not releasing seller or other ESP information along with the aggregation tables of bundled customer quarterly capacity data does not change the effect of releasing the latter and therefore does not support a claim that the latter are a trade secret.
9. The aggregation tables of bundled customer quarterly capacity data provide a benefit to the public by allowing for public participation in the State's energy policy proceeding, by providing input into the CPUC's procurement process, and by sending market signals regarding the appropriate timing, location, and quantity needed of new generation and/or energy efficiency and demand response programs.

## **Conclusions of Law:**

1. We incorporate by reference Conclusions of Law 1 – 3 above from our discussion of bundled customer annual capacity information.
2. Because release of aggregation tables of bundled customer quarterly capacity data will not cause the IOUs to lose an economic advantage or other market participants to gain an economic advantage vis-à-vis the IOUs, the IOUs have not made a reasonable argument that this information is a trade secret, or that the public interest in non-disclosure clearly outweighs the public interest in disclosure.
3. We incorporate Conclusions of Law 5 – 6 above from our discussion of bundled customer annual capacity information.

## **Bundled Customer Quarterly Energy**

SCE and PG&E appealed release of aggregations of bundled customer quarterly energy data. No IOU appealed release of aggregated bundled customer annual energy information, and the only question is whether disclosure of bundled customer quarterly energy aggregations presents a risk of harm that the annual information does not. The reason that it does, according to PG&E, is the fact that PG&E utilizes significant quantities of seasonal resources, primarily hydroelectric. (PG&E Appeal, p. 3.) SCE also cites its reliance on hydroelectric facilities (SCE Appeal, p. 6.) in its appeal of this aggregation. However, the staff testimony clearly demonstrates that very precise and detailed monthly historical data on SCE's and PG&E's hydroelectric fleet is already publicly available. (Staff Rebuttal Testimony, Attachment G.) This data provides considerable insight into the IOUs' reliance on these facilities both seasonally, and over time in both wet years and dry years. Therefore, we conclude that the release of aggregated forecasts will not in any way affect market participants' understanding of how these facilities will operate in the long-term 2009 -2016 time period in dispute in these appeals. Release of this aggregation table will not raise ratepayer prices and is therefore not a trade secret, nor does the public interest in non-disclosure of this information clearly outweigh the public interest in disclosure.

## **Findings of Fact:**

1. We incorporate by reference Findings of Fact 1 – 7 above from our discussion of bundled customer annual capacity information.
2. The aggregation tables of bundled customer quarterly energy data identify only total amount of demand for the entire quarter, and by themselves, provide no information about how demand will vary over the quarter.
3. The aggregation tables of bundled customer quarterly energy data show trends in supply and demand for 2009 – 2016, but are not directly correlated to the demand that is governing the IOUs' actual resource selection. Rather, the information is simply input into a planning and procurement regulatory process, and will be subject to adjustments at both the Commission and the CPUC, as well as by the IOUs themselves as their market position shifts over time. Moreover, very precise and detailed monthly historical data on SCE's and PG&E's hydroelectric fleet is already publicly available that provides

considerable insight into the IOUs' reliance on these facilities both seasonally, and over time in both wet years and dry years. Therefore, we conclude that the release of aggregation tables of bundled customer quarterly energy data will not in any way affect market participants' understanding of how these facilities will operate in the future.

4. The IOUs have a broad range of options for meeting their long-term demand needs, making their demand for both energy and capacity elastic over time. Under these conditions, release of the aggregation tables of bundled customer quarterly energy data for the 2009 – 2016 timeframe is not likely to allow a supplier or group of suppliers to exercise a competitive advantage over the IOUs in electricity purchase or sales negotiations.
5. The release by other California and western utilities operating in the same market of similar or more detailed information than that contained in the aggregation tables of bundled customer quarterly energy data is a powerful indication that the release of this information does not cause rate increases.
6. Because the IOUs routinely provide long-term forecasts for transmission planning purposes, as well as actual historical data in other forums, market participants can make very sophisticated estimates of the IOUs' market positions over time. As a result, we do not believe that aggregation tables of bundled customer quarterly energy data will change market participants' understanding the IOUs' position in such a way as to affect contractual negotiations.
7. The IOUs' testimony referencing the 2000 and 2001 energy crisis and Dr. Plott's experiments does not support a conclusion that release of the aggregation tables of bundled customer quarterly energy data will cause ratepayer prices to increase because the market conditions underlying both the prior crisis and Dr. Plott's experiments are very different from those under which the IOUs are currently procuring.
8. The fact that the Commission is not releasing seller or other ESP information along with the aggregation tables of bundled customer quarterly energy data does not change the effect of releasing the latter and therefore does not support a claim that the latter are a trade secret.
9. The aggregation tables of bundled customer quarterly energy data provide a benefit to the public by allowing for public participation in the State's energy policy proceeding, by providing input into the CPUC's procurement process, and by sending market signals regarding the appropriate timing, location and quantity needed of new generation and/or energy efficiency and demand response programs.

#### **Conclusions of Law:**

1. We incorporate by reference Conclusions of Law 1 – 3 above from our discussion of bundled customer annual capacity information.
2. Because release of aggregation tables of bundled customer quarterly energy data will not cause the IOUs to lose an economic advantage or other market participants to gain an

economic advantage vis-à-vis the IOUs, the IOUs have not made a reasonable argument that this information is a trade secret, nor that the public interest in non-disclosure clearly outweighs the public interest in disclosure.

3. We incorporate Conclusions of Law 5 – 6 above from our discussion of bundled customer annual capacity information.

#### Planning Area Quarterly Capacity

SDG&E and PG&E appealed the release of aggregations of planning area quarterly capacity. Because this information is even more aggregated than the bundled customer quarterly capacity aggregations, we conclude that its release will not raise ratepayer prices and is therefore not a trade secret, nor does the public interest in non-disclosure of this information clearly outweigh the public interest in disclosure.

#### **Findings of Fact:**

1. We find that our Findings of Fact 1 – 8 above from our discussion of bundled customer quarterly capacity information are equally applicable to the aggregation tables of planning area quarterly capacity data.
2. The aggregation tables of planning area quarterly energy data provide a benefit to the public by allowing for public participation in the State's energy policy proceeding, and by sending market signals regarding the appropriate timing, location and quantity needed of new generation and/or energy efficiency and demand response programs.

#### **Conclusions of Law:**

1. We incorporate by reference Conclusions of Law 1 – 3 above from our discussion of bundled customer quarterly capacity information.

#### Planning Area Quarterly Energy

PG&E appealed the release of aggregations of planning area quarterly energy data. Because this information is even more aggregated than bundled customer quarterly energy aggregations, we conclude that its release will not raise ratepayer prices and is therefore not a trade secret, nor does the public interest in non-disclosure of this information clearly outweigh the public interest in disclosure.

#### **Findings of Fact:**

1. We find that our Findings of Fact 1 – 8 above from our discussion of bundled customer quarterly energy information are equally applicable to the aggregation tables of planning area quarterly energy data.
2. The aggregation tables of planning area quarterly energy data provide a benefit to the public by allowing for public participation in the State's energy policy proceeding, and

by sending market signals regarding the appropriate timing, location and quantity needed of new generation and/or energy efficiency and demand response programs.

**Conclusions of Law:**

1. We incorporate by reference Conclusions of Law 1 – 3 above from our discussion of bundled customer quarterly energy information.



## ORDER ON SDG&E'S APPEAL

Therefore, the Commission ORDERS the following with respect to SDG&E:

1. SDG&E's appeal of the Executive Director's Notice of Intent to Release Aggregated Data is denied.
2. Aggregations of SDG&E's bundled customer annual capacity data, bundled customer quarterly capacity data, and planning area quarterly capacity data are public, but shall not be available for inspection or copying for a period of fourteen days from the issuance of this order. (Cal. Code Regs., tit. 20, § 2505, subd. (a)(3)(C).)

Date: September 7, 2005

STATE ENERGY RESOURCES  
CONSERVATION AND  
DEVELOPMENT COMMISSION

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JOSEPH DESMOND  
Chairman

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JACKALYNE PFANNENSTIEL  
Vice Chair

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ARTHUR H. ROSENFELD  
Commissioner

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JAMES D. BOYD  
Commissioner

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JOHN L. GEESMAN  
Commissioner

## ORDER ON SCE'S APPEAL

Therefore, the Commission ORDERS the following with respect to SCE:

1. SCE's appeal of the Executive Director's Notice of Intent to Release Aggregated Data is denied.
2. Aggregations of SCE's bundled customer annual capacity data, bundled customer quarterly capacity data, and bundled customer quarterly energy data are public, but shall not be available for inspection or copying for a period of fourteen days from the issuance of this order. (Cal. Code Regs., tit. 20, § 2505, subd. (a)(3)(C).)

Date: September 7, 2005

STATE ENERGY RESOURCES  
CONSERVATION AND  
DEVELOPMENT COMMISSION

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JOSEPH DESMOND  
Chairman

---

JACKALYNE PFANNENSTIEL  
Vice Chair

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ARTHUR H. ROSENFELD  
Commissioner

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JAMES D. BOYD  
Commissioner

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JOHN L. GEESMAN  
Commissioner

## ORDER ON PG&E'S APPEAL

Therefore, the Commission ORDERS the following with respect to PG&E:

1. PG&E's appeal of the Executive Director's Notice of Intent to Release Aggregated Data is denied.
2. Aggregations of PG&E's bundled customer annual capacity data, bundled customer quarterly capacity data, bundled customer quarterly energy data, planning area quarterly capacity data, planning area quarterly energy data, and planning area quarterly capacity data with ranges are public, but shall not be available for inspection or copying for a period of fourteen days from the issuance of this order. (Cal. Code Regs., tit. 20, § 2505, subd. (a)(3)(C).)

Date: September 7, 2005

STATE ENERGY RESOURCES  
CONSERVATION AND  
DEVELOPMENT COMMISSION

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JOSEPH DESMOND  
Chairman

---

JACKALYNE PFANNENSTIEL  
Vice Chair

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ARTHUR H. ROSENFELD  
Commissioner

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JAMES D. BOYD  
Commissioner

---

JOHN L. GEESMAN  
Commissioner

## ATTACHMENT A

**Table 1. Proposed level of detail for release of aggregated annual and quarterly capacity resource data**

### **PEAK DEMAND CALCULATIONS (MW):**

Reference Case Forecast Total Peak Demand  
Load Adjustment for a Scenario (-)  
Uncommitted Price Sensitive DR Programs (-)  
Uncommitted Energy Efficiency (2009-2016) (-)  
Distributed Generation (-)  
Net Peak Demand for Bundled Customers  
Net Peak Demand + 15% Planning Reserve Margin  
Firm Sales Obligations

### **Firm Peak Resource Requirement**

### **EXISTING & PLANNED RESOURCES**

Utility-Controlled Fossil and Nuclear Resources:  
Nuclear  
Fossil

### **Total Dependable Fossil and Nuclear Capacity**

Utility-Controlled Hydroelectric Resources (1-in-2):  
Total for all plants over 30 MW nameplate  
Total for all plants 30 MW nameplate or less  
Pump Storage Generation

### **Total Dependable Hydro Capacity**

### **Total Utility-Controlled Physical Resources**

### **EXISTING & PLANNED CONTRACTUAL RESOURCES**

DWR Must-take Contracts:  
Contract A

....

Contract N

### **Total DWR Contracts**

QF Dependable Capacity  
Renewable Contracts  
Other Bilateral Contracts  
Short Term and Spot Market Purchases

### **TOTAL: EXISTING & PLANNED CAPACITY**

Existing Interruptible / Emergency (I/E) Programs  
Uncommitted Dispatchable Demand Response

### **TOTAL CAPACITY + I/E and UDDR**

### **FUTURE GENERIC RESOURCE NEEDS**

Generic Renewable Resources  
Capacity of other Generic Additions  
**Total Capacity of Future Generic Resources**

Note: Dispatchable DWR contracts are included in the Other Bilateral Contracts.

**Table 2. Proposed level of detail for release of aggregated annual and quarterly energy resource data**

**ENERGY DEMAND CALCULATIONS (GWh)**

Reference Case Forecast Total Energy Demand

Load Adjustment for Scenario (-)

Uncommitted Energy Efficiency (2009-2016) (-)

Distributed Generation (-)

Net Energy Demand for Bundled Customers

Firm Sales Obligations

**Total Energy Requirement**

**EXISTING & PLANNED RESOURCES**

**Utility-Controlled Fossil and Nuclear Resources:**

Nuclear

Fossil

Hydro

**Total Fossil and Nuclear Energy Supply**

**EXISTING & PLANNED CONTRACTUAL RESOURCES**

**Must-take DWR Contracts:**

Contract A

....

Contract N

**Total Energy Supply from DWR Contracts**

Total Energy Supply from QF Contracts

Total Existing & Planned Renewable Contracts

Short Term and Spot Market Purchases

**TOTAL: EXISTING & PLANNED ENERGY**

**FUTURE GENERIC RESOURCE NEEDS**

Generic Renewable Energy

Generic Resource Addition Energy

**Total Future Generic Resource Needs**

Note: Dispatchable DWR contracts are included in the **Other Bilateral Contracts**.

**Service List: 04-IEP-1D**

**Commission Order Denying Appeals of San Diego Gas and Electric Company, Southern California Edison Company, and Pacific Gas and Electric Company of the Executive Director's Notice of Intent to Release Aggregated Data, Dated September 7, 2005**

*Energy Commission*

Chairman Joseph Desmond

Vice Chair Jackalyne Pfannenstiel

Commissioner Arthur Rosenfeld

Commissioner Jim Boyd

Commissioner John Geesman

Jonathan Blees

Caryn Holmes

Michael Jaske

Kevin Kennedy

*Pacific Gas and Electric Company*

Christopher Warner

*Southern California Edison Company*

Beth Fox

Frank Cooley

*San Diego Gas and Electric Company*

Lisa Urick

*Independent Energy Producers*

Brian Cragg